U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

OFFICE OF CHIEF COUNSEL FOR ADVOCACY

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ORIGINAL FILE

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Amendment of Parts 65 and 69 of	)	
the Commission's Rules to Reform	)	CC Docket No. 92-133
the Interstate Rate of Return	)	
Represcription and Enforcement	)	
Processes	)	

Comments of the Chief Counsel for Advocacy of the United States Small Business Administration on the Notice of Proposed Rulemaking

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SUMMARY

The Federal Communications Commission (FCC or Commission) regulates that portion of the local exchange service used to provide interstate interexchange service. Prior to 1990, all local exchange carriers (LECs) were regulated under conventional cost-of-service regulation. This required the FCC to determine a unitary rate-of-return for all LECs in order to ensure just, reasonable, and non-discriminatory rates. The Commission established this unitary rate in a complex proceeding known as represcription.

In 1990, the FCC mandated regulation of the Regional Bell and General Telephone Operating Companies (RBOCs and GTOCs respectively) by price caps. Price caps permit the RBOCs and GTOCs to retain income in excess of the unitary rate-of-return as long as they do not exceed the limits on the movement of prices permitted under this new regulatory regime. Price cap regulation eliminates almost 94% of the interstate access revenue from regulation under the conventional rate-of-return methodology.

The Commission recognized that the current represcription process was no longer valid for the some 1,300 LECs, most of them small Tier 2 carriers (revenue under 40 million dollars). The FCC instituted the instant rulemaking to convert the

represcription process into a normal notice and comment rulemaking.

The Office of Advocacy supports the efforts of the Commission to reduce the regulatory burdens on small carriers. Rather than devote their resources to complex and unnecessary proceedings, these carriers can expend their scarce capital in providing universal service and implementing advanced technologies.

The Office of Advocacy opines that a semi-automatic trigger for the initiation of represcription is appropriate because it gives the Commission a final opportunity to determine whether represcription is necessary. The Office of Advocacy does not favor any of the trigger mechanisms proffered in the proposed rule. None of these mechanisms, each of which relies on data from companies traded on the New York Stock Exchange, is appropriate for measuring changes in the ability of small companies to obtain capital. Rather, the Office of Advocacy wishes to see a trigger that more closely mirrors the financial structure of small LECs.

The Office of Advocacy backs the Commission's proposal to remove the burdens associated with participation in the represcription process. Conversion into normal notice and comment rulemaking will provide an adequate ventilation of views on the appropriate rate-of-return. The Office of Advocacy does not believe that page limits are appropriate on filings, that discovery is necessary, or that specific financial documents need to be disclosed. Rather, a simple requirement that all studies and data relied on by the participant must be appended to the comments will provide sufficient grist for the analytical mill.

The Office of Advocacy also is troubled by the Commission's overreliance on RBOC, GTOC, and other large corporations for the calculation of cost of capital. The Office of Advocacy believes that mandatory participation by the National Exchange Carrier Association will allow the FCC to calculate the cost of capital, the cost of debt, and a capital structure appropriate to that of Tier 2 LECs.

As corollary to these suggested revisions to the proposed rule, the FCC should conduct a regulatory flexibility analysis as described in § 604 of the Regulatory Flexibility Act. The Commission should find that the analytical framework of the Act would uncover appropriate means to tailor the represcription process to the benefit of small LECs. The Office of Advocacy stands ready to assist the Commission staff in this effort.

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I. *Introduction*

The Communications Act of 1934, 47 U.S.C. §§ 151-609 (Act), authorizes Federal Communications Commission (FCC or Commission) regulation of interstate telecommunications services to ensure that rates are just, reasonable, and non-discriminatory. *Id.* at § 201. These rates must be sufficient for carriers to obtain rates-of-return on their investments that are not confiscatory, maintain credit, and enable them to attract capital.[1] Under this authority, the Commission regulates that portion of the local exchange carriers' (LECs) network used to provide access to

[1] *See* FPC v. Hope Natural Gas, 320 U.S. 591, 603 (1944); Ohio Bell Tel. Co. v. FCC, 949 F.2d 864, 867 (6th Cir. 1991); Farmers Union Cent. Exch. v. FERC, 734 F.2d 1486, 1502 (D.C. Cir.), *cert. denied sub. nom.*, Ass'n of Oil Pipelines v. Farmers Union Cent. Exch., 469 U.S. 1034 (1984).

interstate interexchange services which are provided by interexchange carriers (IXCs).

Prior to 1990, the Commission regulated LECs using conventional cost-of-service ratemaking. The carrier submitted a rate request to the Commission along with substantial amounts of supporting cost data. The FCC then determined a rate which would reimburse the carrier for the cost of providing service and earn a specified return on its investment. Reductions in costs or tariff increases that resulted in a rate-of-return greater than that specified by the Commission would precipitate FCC action to return the revenue earned in excess of that dictated by the rate-of-return to LEC customers.[2]

These rates-of-return were initially calculated in trial-type hearings. This process was satisfactory as long as AT&T had a monopoly on interexchange service and could vary its rates according to the appropriate rate-of-return for each LEC. The process was aided invariably by AT&T's ownership of the Bell Operating Companies (RBOCs) and their position as the largest provider of local exchange service. Competition in interexchange markets and divestiture of the RBOCs would have transformed a reasonably straight-forward process into a logistical and litigative nightmare had not the Commission acted.

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[2] *E.g.*, AT&T v. FCC, 836 F.2d 1386 (D.C. Cir. 1988) (per curiam).

In 1986, the Commission recognized that its old procedures for determining an appropriate rate-of-return needed significant revamping. The FCC instituted a rulemaking to permit the represcription of a unitary rate-of-return for all dominant carriers (AT&T and the LECs) without utilizing a trial-type proceeding.[3] That rulemaking ended with the adoption of the current rules which attempted to replicate the hearing process through written filings. The rulemaking reduced the burdens associated with represcribing the rate-of-return.

The FCC now regulates the RBOCs and General Telephone Operating Companies (GTOCs) under price caps.[4] Other very large LECs can select price caps and four have done so. Price caps represent an alternative means by which the FCC can ensure just, reasonable, and non-discriminatory rates. The touchstone of the price cap regime is the authorization of price variability by carriers as long as those carriers do not exceed certain predefined limits. As long as prices stay within the specified limits, carriers can retain earnings without regard to the actual rate-of-return obtained by the carrier.

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[3] In the Matter of Authorized Rates-of-Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase II, 51 Fed. Reg. 1795 (January 15, 1986).

[4] Policy and Rules Concerning the Rates for Dominant Carriers, Second Report and Order, 5 FCC Rcd 6786 (1990).

The main targets of the represcription process were carriers that are no longer subject to rate-of-return regulation. Yet, the represcription regulations still mandate participation by companies that have no interest in calculating a unitary rate-of-return to price their services. 47 C.F.R. § 65.500. The represcription regulations, at least in the estimation of the FCC, also appear to be more cumbersome than necessary given the small amount of interstate access revenue still subject to rate-of-return regulation.[5]

Therefore, the Commission issued the instant rulemaking to reform the represcription process. In the Matter of Amendment of Parts 65 and 69 of the Commission's Rules to Reform the Interstate Rate-of-Return Represcription and Enforcement Processes, CC Docket No. 92-133, Notice of Proposed Rulemaking (July 14, 1992) (NPRM). Pursuant to the Regulatory Flexibility Act, 5 U.S.C. §§ 601-12 (RFA), the Commission certified that this proceeding will not have a significant economic impact upon a substantial number of small entities. NPRM at ¶ 105.

The Office of Advocacy concurs in the Commission's assessment that the represcription process needs to be overhauled. The Office of Advocacy commends the Commission for taking this step and furthering its announced goal of reducing

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[5] The FCC estimates that only about 6% of the interstate access revenue is not subject to price cap regulation. NPRM at ¶ 2.

the regulatory burdens on small telephone companies.[6] The Office of Advocacy believes that an appropriately tailored represcription process will provide a cost-effective regulatory regime for LECs subject to rate-of-return regulation. These lower costs can then be passed on as cost savings to IXCs and ultimately to users of telecommunication services.

The Office of Advocacy disputes the FCC's reliance on the financial structure of RBOCs and other large corporations in the represcription process. The Office of Advocacy believes that different components must be developed that better mirror the financial situation faced by small LECs.

As a corollary to this concern, the Office of Advocacy is again dismayed at the Commission's certification pursuant to the RFA. The analytical techniques contemplated by the RFA will assist the FCC in designing a low-cost and effective represcription process for small telephone companies. The Office of Advocacy requests that a final regulatory flexibility analysis be performed prior to the adoption of a final rule.

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[6] *See* In the Matter of Regulatory Reform for Local Exchange Carriers Subject to Rate-of-Return Regulation, CC Docket No. 92-135, Notice of Proposed Rulemaking, slip op. (July 17, 1992) (Regulatory Reform Proceeding); In the Matter of Regulation of Small Telephone Companies, Report and Order, 2 FCC Rcd 3811 (1987).

II. *Initiating Represcription*

The FCC currently mandates that a represcription begin on January 1 of each even numbered year. 47 C.F.R. § 65.102(c). This regulation applies irrespective of the condition of the capital markets or whether any changes have occurred necessitating represcription since the prior proceeding. The Commission recognizes that this is unnecessary. NPRM at ¶¶ 19-22. The Commission proposes that represcription be triggered by some measure of change in the capital markets and that this may result in irregular institution of represcription. *Id.* at ¶ 22. The Commission also suggests that the trigger may be automatic or semi-automatic, in which case further analysis to determine the need for represcription would be necessary. *Id.* at ¶ 25. The FCC requests comments on the trigger mechanism and whether it should be automatic.

The Office of Advocacy agrees with the Commission concerning the need to revise the triggering of represcriptions. Represcriptions are an expensive proposition especially for small carriers and require the diversion of scarce resources from their primary mission -- delivering telecommunication services. By holding represcriptions to the minimum needed to ensure adequate service and return on investment, the FCC will reduce costs faced by small carriers.

The Office of Advocacy supports the use of a semi-automatic trigger and believes that the Commission must retain some discretion in determining whether to conduct represcription. An automatic trigger may lead to the same situation currently imposed by the mandated biennial review. While an automatic trigger will provide certainty, circumstances still may dictate that a represcription proceeding need not be instituted. The semi-automatic trigger ensures that the cost of participation in a represcription proceeding will be borne by small LECs only when it becomes absolutely necessary.

Whether the trigger is automatic or semi-automatic, it must be based on the capital costs for companies similar to that of small LECs. These companies will raise funds through the sale of stock, bank lending, and loans from special programs of the federal government. Utilization of Standard & Poor's, Dow Jones, or other general indices of capital market health will not be representative of the cost of capital and debt for small LECs. Measurement of changes in the capacity of utilities to raise capital, in the first instance, must be measured by reference to indices restricted to utilities. The trigger also must account for changes in the cost of debt both in the private sector[7] and the government. This may be a complex index but will insure that

[7] For all but a few carriers, this means that the cost of borrowing from a bank. Few non-price cap carriers have the financial resources to plumb the depths of the commercial paper or bond market by themselves.

the factors affecting the ability of small LECs to obtain capital will be considered.

III. *Conduct of the Represcription Proceeding*

Represcription proceedings initially involved the use of formal hearings pursuant to §§ 554, 556, and 557 of the Administrative Procedure Act. This process worked well when a nearly monolithic AT&T owned the vast majority of the local exchange carriers and provided all of the switched access interexchange service.

Changes in the telecommunications industry necessitated renovation to the represcription process. The FCC finally adopted a procedure that has the benefits of a formal process but reduces complexity by limiting participants to written filings.[8] 47 C.F.R. Part 65.

Given the number and size of companies that are no longer subject to rate-of-return regulation, the Commission believes that the formal procedures for represcribing the rate-of-return have as much in common with the needs of small LECs as

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[8] Oral cross-examination may be approved upon application to an administrative law judge. 47 C.F.R. § 65.104. The FCC proposes to repeal this authority. NPRM at ¶ 39. The Office of Advocacy supports repeal of the oral testimony as being superfluous to the informality of notice and comment rulemaking.

thermonuclear war with a minuet.[9] The FCC wants convert the process to notice and comment rulemaking.

If the Commission can remove rate-of-return regulation on some carriers through notice and comment procedures, then the Office of Advocacy firmly believes that the Commission can impose a unitary rate-of-return on the rest of the LEC industry through the same process. Notice and comment rulemaking will reduce costs faced by small LECs because the process utilizes far fewer administrative resources. Yet, the initial filings and reply comments will provide sufficient opportunity for all interested parties to air their views and rebut various contentions.[10]

The FCC limits the length of filings in the represcription process. This represents a remnant of the represcription's birth as formal hearing under which page limitations are often imposed.

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[9] *See* Vuyanich v. Republic Nat'l Bank, 521 F. Supp. 656, 661 (N.D. Tex. 1981), *vacated on other grounds*, 723 F.2d 1195 (5th Cir. 1984).

[10] The Commission's rules permit ex parte contacts with the Commissioners and the FCC staff during rulemakings. 47 C.F.R. § 1.1206. However, descriptions of such contacts including any information discussed must be placed in the record and served on all parties to the proceeding. This ensures that all parties have the opportunity to counter any ex parte argument and this procedure should be retained.

As an alternative, the Commission could denote that represcription is a restricted proceeding and prohibit ex parte contacts. *Id.* at § 1.1208. This is less likely to lead to a full ventilation of views on rate-of-return and the FCC should think long and hard before designating the represcription as a restricted rulemaking proceeding.

These limitations have no relevance in notice and comment rulemaking.[11] Current FCC rules recognize this and place no arbitrary limits on the length of filings in notice and comment rulemakings. The Office of Advocacy sees no reason to distinguish the represcription process from any other Commission rulemaking.[12]

The formality of the current hearing process, including discovery, ensures that all data relied on by the various parties will be subjected to close scrutiny. The FCC worries that a notice and comment process may hide potentially significant information of relevance to the represcription. NPRM at ¶¶ 33-34. The Commission requests comments on the need for discovery in the represcription process or whether a simple requirement that specific financial records be released to the parties is adequate disclosure. *Id.*

The Office of Advocacy recognizes the Commission's concern but opines that it is overstated. As a quick, if that is

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[11] *Cf.* Chocolate Mfrs. Ass'n of Amer. v. Block, 755 F.2d 1098, 1103 (4th Cir. 1985) (notice and comment designed to allow agencies benefit of public input); American Ass'n of Meat Purveyors v. Bergland, 460 F. Supp. 279, 282 (D.D.C. 1979) (parties must have effective chance to respond to comments and agency proposal).

[12] The FCC itself does not want to distinguish this proceeding from its normal rulemaking process. NPRM at ¶ 39. Imposition of page limits will begin to make a distinction that the Commission attempts to dispel in its proposed elimination of oral argument and cross-examination.

possible, perusal of the voluminous record in the price cap proceeding demonstrates, parties involved in notice and comment rulemaking leave little left to be discovered. Relevant data will be uncovered, discussed, analyzed, rebutted, and reaffirmed without FCC edicts on the availability of information. To ensure that relevant data is given a full exposure to the critical eye of lawyers, economists, and engineers the Office of Advocacy recommends that the Commission mandate that any study or data used to support a point in comments or reply comments be appended to the comments. This obviates the need for the FCC to mandate specific disclosure of documents that may or may not be relevant to in supporting or rebutting arguments concerning the rate-of-return. By reducing the need to disclose and serve documents, the cost of the represcription process will be minimized.

The Commission currently requires that the Bell Operating Companies participate in the represcription proceeding. *Id.* at ¶ 41. The Office of Advocacy concurs in the FCC's judgement that their further participation is not necessary since they are subject to regulation through the application of price caps. The Office of Advocacy also backs the Commission's proposal to require National Exchange Carrier Association (NECA) as a mandatory participant. Since NECA files tariffs on behalf of many small LECs, it has the resources and information needed for calculating a rate-of-return. This requirement should lower the costs to small LECs.

IV. *Cost of Capital, Cost of Debt, Capital Structure*

The FCC uses a weighted average cost of capital calculation as the base for determining the rate-of-return. A weighted average requires specification of the cost of equity, cost of debt, and the capital structure (ratio of debt to equity). 47 C.F.R. §§ 65.300-.304.

A. Cost of Equity

The cost of equity is based on two distinct quantifications: 1) the DCF method in which the cost of equity depends upon the ratio of the dividend to common share price plus the estimated long-term growth; or 2) the risk premium method in which a premium (calculated through capital asset pricing) is added to low-risk debt (such as federal treasury securities) to determine the return on equity. NPRM at ¶¶ 54-70. The Office of Advocacy is indifferent to either method and believes both will provide an accurate determination of cost of equity if the models are properly specified.[13]

[13] The FCC discusses the valuation of preferred stock under the cost of debt section in the NPRM. NPRM at ¶¶ 81-82. Under generally accepted accounting principles and corporate law, preferred stock is not debt. Capital markets do not price it in the same manner as corporate bonds. Therefore, the Office of Advocacy strongly recommends that preferred stock be considered as part of the cost of equity not debt in the calculation of a rate-of-return.

The Office of Advocacy is troubled by the specification of the two models. Both paradigms rest on references to stock prices. During prior represcriptions, the Commission often used calculations based on the Standard & Poor's 400, the largest 100 utilities, or other groupings from the New York Stock Exchange (NYSE). Reliance on these factors may underestimate the true cost of equity because only a few of the 1300 LECs not subject to price caps have financial characteristics similar to the RBOCs or other companies listed on the NYSE. Therefore, the Office of Advocacy recommends the utilization of stock indices that consist of companies that mirror the financial resources small LECs. This should eliminate the potential that an inadequate cost of equity could result in a rate-of-return that borders on the confiscatory.

B. Cost of Debt

Current represcription regulations require the Commission to calculate the embedded cost of debt for the RBOCs. This figure then becomes the cost of debt for computing the overall cost of capital. The FCC proposes alternatives to this method of calculating the cost of debt. *Id.* at ¶ 77. These options examine a different cost of debt for the RBOCs, embedded cost of debt of other Tier 1 LECs (those with revenue in excess of 100 million dollars), or the embedded cost of debt of other publicly traded companies.

These methodologies for represcribing the rate-of-return are valid if the RBOCs and GTOCs still were subject to conventional rate regulation. However, they are not and of the remaining 1,300 LECs, over 1,250 are Tier 2 LECs (revenue of less than 100 million dollars). The vast majority of these LECs have revenues under 40 million dollars[14] and do not have stock or corporate bonds traded on the NYSE or American Stock Exchange. Using the methodologies suggested by the FCC is akin to asking the Crusaders of Richard the Lionhearted to fight the allied troops of Desert Storm.

The Office of Advocacy strongly doubts that Tier 2 LECs could acquire debt at the same cost as that of the RBOCs or GTOCs. Tier 2 LECs do not have the diversity of customers or a wide geographic base. The loss of one strong customer could impose serious difficulties in the ability of a Tier 2 LEC to meet its debt obligations. The Office of Advocacy strongly believes that an accurate determination of the cost of debt must be based on the cost of debt of similarly situated companies with similar risk scenarios. None of the methodologies suggested by the Commission is appropriate to that end.

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[14] *Cf.* Regulatory Reform Proceeding, Notice of Proposed Rulemaking ¶ 27 (only 39 Tier 2 LECs file historical cost tariffs).

To find a germane system for calculating the cost of debt, the Commission should use a composite of the embedded cost of debt for Tier 2 LECs. This calculus would take account of commercial, federal, and state financing. Although this quantification may be more difficult than focusing on the embedded costs of eight or nine of the largest corporations in the world, it would provide a more accurate picture of the debt costs faced by Tier 2 LECs. The Office of Advocacy believes that the Commission should take on this additional burden to find a truer picture of debt costs faced by small LECs.[15]

C. Capital Structure

The current rules require use of a composite of the RBOCs' capital structure to calculate the weighted average cost of capital in the represcription process. 47 C.F.R. §§ 65.201, .300, .304. The Commission believes that these rules are equally applicable to determining the weighted average cost of capital for those LECs still subject to rate-of-return regulation. NPRM at ¶ 84. Even so, the Commission offers a number of alternatives including the use of a composite of a representative sample of the capital structures of LECs not subject to regulation under price caps. *Id.* at ¶ 85.

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[15] The FCC could utilize the resources of NECA and other collectors of local exchange company data. Since NECA would be a mandatory participant in the represcription proceeding, they could be tasked with calculating this composite embedded cost.

The Office of Advocacy opposes the readoption of the current standard for calculating the weighted average cost of capital. The financial structure of the RBOCs and their debt-to-equity ratios have little in common with small carriers that derive a significant portion of their investment from bank loans or government agencies.

The Office of Advocacy opines that the better approach is to utilize a composite of a representative sample of the capital structure of LECs subject to rate-of-return regulation. This alternative, especially in conjunction with the recommendations made in these comments on calculating the cost of debt, will give a far more realistic picture of the financial structure and capacities of carriers not subject to price cap regulation.[16]

The Commission also requests comment on whether it should adopt one fixed capital structure for all subsequent represcription proceedings. *Id.* at ¶ 86. The FCC reasons that one capital structure would reduce the contentiousness of the represcription proceeding and could lower the cost of future represcriptions.

The Office of Advocacy supports the fixation of one capital structure. However, the Office only backs this proposal if the

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[16] The Office of Advocacy also believes that the FCC can rely on NECA to develop the composite picture.

Commission adopts a capital structure based on a composite of Tier 2 LECs.[17] Any other capital structure should not be dispositive in future represcriptions and the Office of Advocacy would not support any FCC efforts to impose some other definitive capital structure for future represcription proceedings.

D. Summary

The Office of Advocacy fully backs FCC efforts to revise the calculation of the cost of capital for small LECs. However, the Office of Advocacy remains troubled by the Commission's heavy reliance on data from the RBOCs. While this data is easily obtained, it is not representative of the structure of Tier 2 LECs. The FCC must adopt standards that mirror the financial situation that currently exists with respect to small LECs.

[17] The Office of Advocacy recognizes that every Tier 2 LEC is slightly different. In an optimal world, each LEC will have a predetermined rate-of-return based on its individual capital structure. Since the current regulation of Tier 2 LECs does not occur in this idyllic atmosphere, the composite capital structure represents an adequate alternative especially given that the FCC is selecting a unitary rate-of-return for all non-price cap LECs. Moreover, the capital structure of most small LECs is not likely to change between adoption of the current rules and any new represcription proceedings undertaken in the near future. If the capital structure changes substantially, the FCC has the authority to issue new rules on capital structure, either in a separate proceeding or in the appropriate represcription proceeding.

V. *Compliance with the Regulatory Flexibility Act*

The Commission concluded that the RFA does not apply to this rulemaking and did not perform a regulatory flexibility analysis despite the obvious impact that this proposal has on small business. The Commission noted that the definition of a small business under the RFA is one that is independently owned and operated and not dominant in its field.[18] 5 U.S.C. § 601(3). The Commission, having previously determined that all LECs are dominant in their field, then simply concluded that these companies are not small businesses. The FCC's logic represents a constricted view of the RFA; the Office of Advocacy gives a broader interpretation to the Act.

The RFA also permits an agency for purposes of complying with the Act to select a different definition of small business after consultation with the Office of Advocacy. Nothing in the RFA requires an agency to adopt that definition to carry out its statutory mandate. The Office of Advocacy interprets the RFA to

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[18] This definition is identical to that in the Small Business Act, 15 U.S.C. § 632. Pursuant to that Act, the Small Business Administration developed size standards for many classes of businesses to carry out its mandate of providing financial, procurement, and technical assistance to small businesses. Those size standards do not apply to the regulatory regimes of other agencies but are used by the agencies in complying with the RFA. Congress expected such utilization of the Small Business Administration size standards.

give the FCC sufficient discretion to adopt one size standard for regulatory purposes and another for compliance with the analytical requirements of the Act. Therefore, the Commission can analyze the impact of these rules while maintaining its distinction between dominant and non-dominant common carriers.

Even if the Commission asserts that such dual standards are unworkable, the Office of Advocacy contends that the FCC's conclusion concerning the dominance of small LECs is incorrect. The FCC has argued elsewhere that reform of rate regulation is necessary because these small LECs face competition for their provision of interstate access services.[19] If the Commission believes that competition presents a serious enough challenge that regulatory modifications must be made to ensure the financial health of small LECs, then the Commission cannot assert that these carriers are monopolies and dominant in their fields. Thus, the LECs are small businesses under the RFA and the FCC should have prepared a regulatory flexibility analysis. The Office of Advocacy requests, that prior to the adoption of a final rule, the FCC prepare an analysis pursuant to § 604 of the RFA.[20]

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[19] Rate Reform Proceeding, slip op. at ¶¶ 17, 45.

[20] If the Commission does not accede to this request, then the RFA requires the FCC to publish the certification statement and a succinct explanation in the FEDERAL REGISTER pursuant to § 605. The Commission failed to perform this statutorily mandated function in the preparation of the proposed rule. *See* 57 Fed. Reg. 31,994 (July 20, 1992).

Nor will the Commission find adequate justification to avoid its obligation by contending that these carriers still dominate the provision of local exchange service -- a conclusion that the Office of Advocacy will not gainsay. Commission precedent exists for disparate regulatory treatment of different portions of an individual carrier's service. In the proceeding to streamline the regulation of AT&T,[21] the Commission concluded that AT&T was no longer the dominant provider of many types of business telecommunication services even though it remained dominant in the provision of 800, residential, small business, and international toll services. Streamline Proceeding, slip op. at ¶¶ 147, 165. The Office of Advocacy sees no obstacle to finding that small LECs are no longer dominant in the provision of transport services to IXCs and the RFA applies to them in that capacity. This determination will not upset the Commission's otherwise finely-honed regulatory scheme; yet, it will give the FCC adequate tools to examine the impact of represcription reform on small LECs.

VI. *Conclusion*

Small LECs have limited financial and administrative resources. These assets must be devoted to the achievement of

[21] In the Matter of Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order (October 25, 1991) (Streamline Proceeding).

universal service and the implementation of advanced telecommunication technologies. Any procedures that vitiate this effort, such as unnecessary represcription proceedings, must be modified. The Office of Advocacy fully backs the Commission's efforts to alleviate the burdens associated with the represcription process.

The Office of Advocacy believes that the represcription process can be tailored to meet the needs of small LECs. However, the Commission's proposals, from the trigger of the represcription process to the calculation of the capital structure, rely to heavily on data from companies subject to regulation pursuant to price caps. These companies, which are among the largest enterprises in the world, have financial capabilities beyond the grasp of all small LECs. The Office of Advocacy recommends that the Commission use this proceeding to design a represcription process adapted to the needs and structures of small LECs.

To accomplish this task, the Office of Advocacy suggests the Commission rely on the analytical tools of the Regulatory Flexibility Act. A proper final regulatory flexibility analysis will identify the proper components of a represcription process to match the unique financial and service obligations of small LECs. If the Commission or its staff have any questions concerning the application of the RFA to this proceeding or the